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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 196

UNITED STATES OF AMERICA

Petitioner

against

PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF ON BEHALF OF RESPONDENT, PRESIDENT AND DIRECTORS OF THE MANHATTAN COMPANY, IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Report of Opinions Below.

Opinion of the District Court (R. 92) is reported in 10 Fed. Supp. 269; the opinions of the Circuit Court of Appeals are reported in 77 Fed. (2d) 866.

Questions Presented.

The court below dealt with the following questions:

1. Whether a decree enacted by the Soviet Government in alleged confiscation of the assets of a Russian corporation without compensation to the owners of such corporation is repugnant to our public policy; whether such decree is entitled to extra-territorial effect; and whether it vests title in the Soviet Government to assets belonging to the Northern Insurance Company of Moscow located in the United States.

2. Whether Litvinoff's letter of November 16, 1933, purporting to assign amounts due by American Nationals, includes the funds of the Northern Insurance Company of Moscow, a Russian National, held in trust for it and its creditors by the respondent.

3. Whether the District Court can oust the New York Supreme Court from the jurisdiction of a fund over which the State Court has had jurisdiction for upwards of ten years.

The Decisions Below.

The District Court held that the Soviet decrees were not enforcible in this country and were shocking to public policy. The District Court also held that, in any event, the assignment did not cover the funds held by the respondent and that it was not an American National which owed any debt to the Soviets, and, therefore, nothing passed to the petitioner under the assignment.

In light of such holding, the court did not deem it necessary to pass upon the jurisdictional question.

The Circuit Court of Appeals, in its prevailing opinion, sustained the decree dismissing the bill of complaint of the petitioner on the ground that the State Court having acquired jurisdiction of the *res*, the Federal Court had no right or power to disturb that jurisdiction, and that the Federal Court did not have exclusive jurisdiction of an action instituted by the United States of the character presented here. The Circuit Court of Appeals deemed it inadvisable as well as unnecessary to pass upon any question in the case other than that of jurisdiction (77 Fed. [2d] 866, 869). The dissenting opinion of Judge MANTON of the Circuit Court of Appeals held a contrary view to the decision of the majority of the Circuit Court of Appeals and also to that of the District Judge.

Statement.

The Northern Insurance Company of Moscow was organized under the laws of the Empire of Russia in the year 1872. It became one of the largest and best known insurance companies in Russia. It established a United States branch, pursuant to the provisions of the New York Insurance Law, in 1911.

The usual statutory deposit exacted from a foreign insurance company, as an incident to the transaction of business here, was made. The company built up a flourishing business in the State of New York. In April, 1925, the Superintendent of Insurance initiated a proceeding in the New York Supreme Court under Section 63 of the New York Insurance Law for an order placing the company in liquidation. An order was entered in that proceeding in June, 1926, which authorized the Superintendent to take possession of the property and assets of the Northern Insurance Company of Moscow for the protection and benefit of its policyholders, creditors, stockholders and the public.

The Superintendent of Insurance entered upon a liquidation of the company. Before the rendition of his final report, the Northern Insurance Company of Moscow commenced a proceeding in the New York Supreme Court for a judgment decreeing the release and return to it of the surplus assets left after the payment of creditors and stockholders who dealt with the United States branch. This relief was resisted by the Superintendent of Insurance of the State of New York upon the ground, among others, that the application was premature and should await recognition of the Soviet Government by the United States. The Superintendent of Insurance also opposed the turning over of the surplus assets upon the ground that the company had been nationalized as a result of the decrees enacted by the Soviet Government and, therefore, had no corporate existence; its directors were without power and they could not maintain the proceeding to recover its surplus assets.

The Court of Appeals in the State of New York overruled the contention of the Superintendent of Insurance in a decision affecting this company and in decisions affecting other Russian insurance companies similarly situated and held that in view of the fact that distribution and liquidation of the assets of the Northern Insurance Company of Moscow, insofar as they were affected by the claims of domestic stockholders and policyholders, had been completed, the Superintendent of Insurance must release the surplus assets of the company so that it might pay those creditors who were not entitled to be classified as creditors of the United States branch. (*Matter of People* v. *Northern Insurance Company of Moscow*, 255 N. Y. 433; *Matter of People* v. *Russian Reinsurance Company*, 255 N. Y. 415.)

In the opinion rendered by the court in the foregoing cases, it was pointed out that the ordinary remedy pursued in the case of an insurance company in liquidation could not obtain. The remedy referred to was the transfer and delivery of the remaining assets by the Superintendent of Insurance whose duties were assumed to be similar to those of an ancillary receiver in equity, to the domiciliary receiver. (*Matter of People—Norske Lloyd Ins. Co.*, 242 N. Y. 148.) Hence the court held that appropriate provision should be made in this country for the payment of foreign creditors.

In the case of the Northern, these creditors consist, to a large extent, of American Nationals who have rendered services to the company in this country and abroad. The group of creditors also comprises French Nationals, English Nationals and German Nationals, all citizens of friendly powers. The Court of Appeals decreed a delivery of the surplus assets to the surviving directors of the Northern Insurance Company of Moscow, conditioned upon the filing of a surety bond. The decision of the court contained an alternative condition permitting the delivery to a trust company in the City of New York in the event of the inability to file the bond so directed by the Court of Appeals. The bond was filed, but before the delivery and transfer of the fund to its directors, it was concluded that the absence of the directors in Europe might delay an early distribution of the funds to the creditors. An application was thereupon made to the Court of Appeals for an amendment of its remittitur so that the funds could be turned over to the Bank of Manhattan Trust Company as agent or depositary. The remittitur was amended and the Court of Appeals directed the transfer of the funds to the Bank. (*Matter of People* v. *Northern Insurance Company of Moscow*, 262 N. Y. 453.)

In the meanwhile, due to the fact that the claims filed with the company by creditors other than domestic creditors were considerably in excess of the assets, an assignment was made for the benefit of creditors. The assignment was made on May 6, 1932, and filed in the New York Supreme Court June 28, 1932. The fund was transferred to the Bank of Manhattan Trust Company and, in turn, pursuant to the order of the New York Supreme Court, transferred by the Bank of Manhattan Trust Company as depositary to itself as assignee.

The assignee thereupon commenced the administration of the trust: advertised for claims, marshalled the assets of its assignor and in June, 1934, prior to the commencement of this action, filed its final account as assignee in the New York Supreme Court. That court entered an order appointing a Referee, Hon. John Godfrey Saxe, to take and state the account of the assignee and to hear objections thereon.

The Referee commenced the duties outlined in the order appointing him and was engaged in passing upon the propriety and validity of claims when this action was instituted. Certain claims of American and European Nationals had been allowed and the reports of the Referee, in connection therewith, had been confirmed. Orders of the New York Supreme Court have been entered directing the amounts to be paid which were found to be due and owing by the Referee, but payment was halted by the commencement of this action. As a result of such decrees the fund is now being held by the respondent subject to the liens of these creditors in whose favor decrees of payment have been made.

The fund which the United States is seeking to recover in this action has always been under the jurisdiction of the New York Supreme Court either in custody of the

Superintendent of Insurance, the defendant Bank as agent or depositary, or in its possession and custody as assignee for the benefit of creditors.

The United States has had notice of the pendency of the assignment proceeding for the benefit of creditors in the New York Supreme Court before the Referee, but has declined to actively participate therein or to note its appearance although invited so to do.

It is submitted that to sustain the Government's contention in this suit would virtually result in the complete reversal of the judgment of the Court of Appeals in a collateral proceeding or action and effectually destroy the remedy made available by that court to the creditors of the Northern Insurance Company of Moscow.

ARGUMENT.

1. The Soviet decree is repugnant to our public policy and has no extra-territorial effect.

The United States claims funds herein by virtue of an assignment from the Soviet Government, but the latter's rights are limited to the extent that the Soviet decrees of confiscation were effective to transfer property located in the State of New York to it. "It can require no argument to show that the transfer of any claim to the United States cannot give to it any greater validity than it possessed in the hands of the assignor." (*United States* v. *Buford*, 3 Peters 12, 30.)

The Soviet decrees dissolving the Russian insurance corporations, appropriating their assets and terminating all rights of creditors and stockholders therein, were penal in their nature and contrary to public policy. Every court which has examined these decrees has held them to be

an affront to justice and of no extra-territorial force. (*Russian Reinsurance Co.* v. *Stoddard*, 240 N. Y. 149; *James & Co.* v. *Rossia Insurance Co.*, 247 N. Y. 262; *Petrogradsky M. K. Bank* v. *National City Bank*, 253 N. Y. 23; *Vladikavkazsky Ry. Co.* v. *New York Trust Co.*, 263 N. Y. 369; *The Jupiter*, 96 L. J. P. 62 (1927 Court of Appeals, p. 250); *Employers Liability* v. *Sedgwick*, 1926 1 K. B. L. (Affd. House of Lords, 1927 A. C. 95); *Etat Russe* v. *Ropit*, (1925) 52 Clunet 391 (Trib. Comm. Marseille) (1926) 53 Clunet 667 (Cour d'Appel), 55 Clunet 674 (Cour d'Cassation); *Ginsberg* v. *Deutsche Bank*, (1928) Juristiche Wochenschrift 1232, 1233 (Kammergericht, Berlin); *Council of Russian Orthodox Community in Copenhagen* v. *Legation of R. F. S. F. R.*, (1925-26) Ann. Dig. of Int. L. Cases 24 (Sup. Court of Denmark); *Wilbuschewitz* v. *Zurich*, (1926) 53 Clunet 1110, 1113 (Trib. Fed.) (1925-26) Ann. Dig. of Int. L. Cases 96.)

Our courts have refused to enforce similar decrees where private property has been generally confiscated and private rights annulled. (*Second Russian Insurance Co.* v. *Miller*, 268 U. S. 552; *Baglin* v. *Cusenier*, 221 U. S. 580; *Lehigh Valley R. R. Co.* v. *State of Russia*, 21 Fed. 2d 396; *Oscanyan* v. *W. R. Arms Co.*, 103 U. S. 261; *Cooke* v. *United States*, 91 U. S. 389; *United States* v. *Percheman*, 7 Peters 51.)

The fact that the present Russian Government was not recognized was not the basis of the court's refusal to give effect to these decrees, but, on the contrary, because they were shocking and inequitable. In *James* v. *Second Russian Insurance Co.*, 239 N. Y. 248, 257, it was stated by Mr. Justice Cardozo:

> "As to the Soviet decree, we think its attempted extinguishment of liabilities is brutum fulmen in England as well as here, and this, whether the

government attempting it has been recognized or not."

The Soviet Government, from whom the United States derives its title, on at least two occasions declared that the decrees were inoperative beyond its own territory (R. 85-86; 90-91). In the event that these pronouncements are not controlling, we have the fundamental rule of justice that this country will not enforce the penal laws of a foreign government. (*Huntington* v. *Attrill*, 146 U. S. 657).

The Soviet Government had at no time title to the fund in suit. The assertion of the Soviet title is based upon an alleged confiscatory decree over property which was never within the territorial boundaries of the Soviet Government. On the contrary such property was at all times within the United States and subject to its laws.

The assertion of title by the Soviet Government under the alleged confiscatory decree is contrary to the public policy of this country, for even though our courts might recognize and enforce foreign confiscatory decrees, if they applied solely to persons and property wholly within the jurisdiction of that country, they will not enforce a decree which would deprive our citizens and citizens of friendly countries of their property without due process of law. (In the instant case the United States Government, as alleged assignee of the Soviet Government, is attempting to seize a fund which is subject to decrees directing payment by the courts of the State of New York to certain creditors.)

Diplomatic recognition of the Union of Soviet Socialist Republics by the United States of America does not oust the State courts of their jurisdiction theretofore duly acquired. All of the claims of domestic and foreign creditors based

upon and pending in the State courts' proceedings, arose prior to recognition, so that the rule that recognition is retroactive does not apply to this situation. In the interregnum between the establishment of a foreign government in power and its recognition by this government, its decree is not entitled to any comity. During such period whatever has been done in our courts is not subject to attack and must be regarded as *res adjudicata* and valid as against the world. *Rose* v. *Himely*, 4 Cranch 241; *Gelston* v. *Hoyt*, 3 Wheat. 246.

The cases of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 and *Ricaud* v. *American Metal Company*, 246 U. S. 304, cited by the Government as most favorable to its position on the effect of recognition, do not go beyond the declaration that the courts of one government will not sit in judgment on the validity of acts done by another sovereign within its own territory. In these cases the property, at the time of seizure, was within the boundaries of the confiscating government. The *Ricaud* case held that despite recognition the United States Courts had jurisdiction to adjudicate the validity of the title acquired by virtue of the seizure.

2. The phraseology of Litvinoff's letter excludes any claim against the respondent.

The assignment was never intended to cover the funds in question. Prior to the exchange of correspondence between our Government and Russia, the *res* had been transferred to the Northern Insurance Company of Moscow under the direction of the Court of Appeals. (*Matter of The People* v. *Northern Insurance Company of Moscow*, 255 N. Y. 433, 261 N. Y. 624, 262 N. Y. 453.) This direction, of course, was a recognition that title to these funds was in the Northern Insurance Company of Moscow and

the assets then in the custody of the Insurance Department belonged to it. If any amount was due the Soviet Government because it was the successor of a prior Russian Government, or otherwise, it was due from a Russian National. The Northern Insurance Company of Moscow was a Russian National and not an American National. While the President and Directors of The Manhattan Company is an American National, there is no debt due from that corporation.

The correspondence between President Roosevelt and Mr. Litvinoff encompassed only the situation as is reflected in the case of *The State of Russia* v. *National City Bank*, 69 Fed. 2d 44. If the funds in question were intended to be covered by the agreement, specific mention of them would have been made. This was done in the case of *The Russian Volunteer Fleet.*

Again, if we take subdivision B of the closing paragraph of the letter, we find that the Soviets also agreed not to make any claim with respect to "acts done * * * by * * * public officials relating to property * * * of * * * any Russian National."

In this case we have the fact that there has been a distribution of a substantial amount of money by the Superintendent of Insurance of the State of New York, a public official, and a transfer of the surplus assets by him under an order of the court to the Bank as assignee. It certainly cannot be established that the Russian Government intended to assign to our Government any claim to either the assets distributed by the Superintendent of Insurance or those now in the process of distribution by the Bank under the jurisdiction of the Supreme Court.

The assignment could only transfer to the United States such right, title and interest that the Soviet Government had at the date of the execution of the instrument of as-

signment. At the time the assignment was made the fund in suit was under the jurisdiction of the Supreme Court of the State of New York and subject to the claims of creditors who had filed their claims in that proceeding. The United States Government's title to the fund, if any, was therefore subject to the same disabilities that existed against the title of its assignor. The United States was, as a result, bound by the pendency of the New York State Court action and the proceedings that had taken place therein, and the existence and approval of prior claims filed against the fund in the possession of the State Court.

3. The Federal Court will not interfere with a proceeding properly pending in a State Court.

Section 24 of the Judicial Code as Amended, c231, 36 Stat. 1087, 1091 (U.S.C. Title 28, Section 41) speaks of original jurisdiction only. The words quoted from that statute do not of themselves, and without more, exclude the jurisdiction of the State Court. The State Court is only excluded from jurisdiction where a statute expressly grants such jurisdiction to the courts of the United States exclusively.

Section 256 of the Judicial Code, U. S. C. Section 371, sets forth when the United States Courts shall have exclusive jurisdiction as distinguished from original jurisdiction. There is nothing in that section which expressly grants to the United States Court exclusive jurisdiction over suits where the United States is a party.

When the Sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations. In the case of *Merryweather* v. *United States*, 12 Fed. 2d 407, 409, Circuit Judge Hunt said:

> "While the United States Courts have original jurisdiction of suits at common law, or in equity, wherein the United States is plaintiff, such jurisdiction is not exclusive. Interpretations of the Constitution settled that point many years ago. In *Plaquemines Fruit Co.* v. *Henderson*, 170 U. S. 511, it was held that the words 'judicial power' used in Section 1 of Article III of the Constitution do not withdraw from States authority to determine by their courts all cases and controversies to which the judicial power of the United States was extended and which jurisdiction was not given to the National courts exclusively."

The Government's suit is in the nature of an action *in rem*. It must be conceded that the original proceeding brought against the Northern Insurance Company in the State Court, the purpose and effect of which was a seizure and a distribution of the insurance company's assets among its creditors, was a proceeding *in rem*. The Government's claim is also *in rem* for what it seeks is a judgment against the funds of the Northern Insurance Company in control and possession of the Bank. (*Pennoyer* v. *Neff*, 95 U. S. 714, 734; *Peoples Trust* v. *United States*, 23 Fed. 2d 381.)

The State Court having prior jurisdiction cannot be deprived of it. (*Byers* v. *McAuley*, 149 U. S. 608; *Ellis* v. *Davis*, 109 U. S. 485; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Covell* v. *Heyman*, 111 U. S. 176; *Borer* v. *Chapman*, 119 U. S. 587; *Freeman* v. *Howe*, 24 How. 450.

The relief sought by the United States to obtain a stay of the State Court proceeding is expressly prohibited by Section 265 of the Judicial Code:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except where such injunc-

tion may be authorized by any law relating to proceedings in bankruptcy."

The provisions contained in this section cannot be violated even by the United States. (*United States* v. *Parkhurst Davis Co.*, 176 U. S. 317.)

Conclusion.

There is neither reason nor authority to sustain the contentions of the Government. The decisions of the courts below are founded on well-established precedents. The record raises no question of merit deserving of review on certiorari.

Respectfully submitted,

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